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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1934

No. 292

In the Matter of MINNIE LERNER,
Bankrupt.

MINNIE LERNER,

Petitioner,

vs.

FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE, WISCONSIN, JAKE RAKITA, SARAH RAKITA, HARRY BLUMENFELD and DORA BLUMENFELD,

Respondents.

BRIEF FOR RESPONDENT FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

EDGAR L. WOOD,
213 West Wisconsin Avenue,
Milwaukee, Wisconsin,
Counsel for Respondent.
FIRST WISCONSIN NATIONAL BANK OF MILWAUKEE.

JOHN C. WARNER,
Of Counsel.

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Opinions Below

There was no opinion in the District Court.

The opinion of the Circuit Court of Appeals (R. 34-36) is reported in 70 Fed. (2d) 938.

Jurisdiction

The interlocutory decree of the Circuit Court of Appeals was entered May 8, 1934, (R. 37). The order

denying the petition for rehearing was entered June 19, 1934 (R. 38) and a stay of the mandate for ninety days was granted on June 19, 1934 (R. 38).

The jurisdiction of this court is invoked under Section 240-a of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented

1. Whether the United States Supreme Court will grant certiorari to review an interlocutory decree of the Circuit Court of Appeals affirming an order of the District Court which denies a motion to strike specifications of objections to a bankrupt's discharge.

2. Whether the reasons relied on by the petitioner are sufficient to invoke the extraordinary writ of certiorari.

3. Whether the District Judge has jurisdiction to enter an order on hearing of bankrupt's petition for discharge extending the time for ten days to file specifications of objections.

Statutes and General Orders Involved

The statutes and general orders involved are set forth in the appendix pages 28-30.

Statement

The petitioner Minnie Lerner was adjudicated a bankrupt on May 22, 1933, and on October 6, 1933, filed her petition for discharge (R. 2). Notice was given creditors setting November 18, 1933 as the day when the petition would be heard by the District Judge and creditors might show cause why the discharge should not be granted (R. 2-3). On November 17, 1933, respondent

First Wisconsin National Bank of Milwaukee duly filed a written notice of appearance in opposition to the petition for discharge and a written request to the court to extend the time to November 28, 1933, within which to file specifications (R. 3). On November 18, 1933, the respondents Jake Rakita, Sarah Rakita, Harry Blumenfeld and Dora Blumenfeld appeared in opposition to the discharge and requested an extension to November 28, 1933, to file specifications of their objections (R. 3).

On November 18, 1933, the District Judge entered an order granting objecting creditors ten days time to file specifications of objections to the discharge of said bankrupt (R. 32).

On November 28, 1933 (within the time limited by the District Judge) written specifications of objections to the bankrupt's discharge were filed by the respondent First Wisconsin National Bank of Milwaukee, based upon three instances where the bankrupt transferred property with intent to hinder, delay and defraud her creditors (R. 9). On November 28, 1933 (within the time limited by the order of the District Judge) written specifications of objections to the bankrupt's discharge were filed by Jake Rakita and the other respondents, and a written order granting objecting creditors until November 28, 1933 to file specifications of objections, was filed (R. 4).

On December 15, 1933, bankrupt moved to strike the specifications because the same had not been filed within the time limited by general order XXXII (11 U.S.C.A. Para. 53), as amended April 17, 1933 (R. 11), which motion was denied by the District Court (R. 12) on December 16, 1933. The decree of the District Court was

an interlocutory order which required trial of the issues raised by the specifications filed by objecting creditors and will result in a final decree allowing or denying the bankrupt's discharge.

An appeal from the order denying this motion was allowed by the Circuit Court of Appeals on January 4, 1934, (R. 18). Respondents moved to dismiss the appeal (R. 29 and 31) which motions were not granted, the matter being considered on the merits (Decision R. 34). The District Court's order denying the bankrupt's motion to strike the specifications was affirmed by the Circuit Court of Appeals (R. 37). The decree of the Circuit Court of Appeals is an interlocutory decree which requires the trial of the issues raised by the specifications on file and will result in a final decree allowing or denying the bankrupt's discharge. A petition for rehearing was denied June 19, 1934 and a stay of the mandate for ninety days was granted (R. 38).

Summary of Argument

This petition for a writ of certiorari should be denied for the United States Supreme Court will not grant certiorari to review an interlocutory decree denying a motion to strike specifications of objections to a bankrupt's discharge. Upon denial of the petition for certiorari the District Court will hear the petition and evidence offered in support of the specifications and enter a final decree allowing or denying the discharge.

The order entered by the District Court is a preliminary order in a proceedings in bankruptcy. The order was affirmed by the Circuit Court of Appeals pursuant to its jurisdiction to revise and review under Section 24b of the Bankruptcy Act, and such decision should be final.

The petition for the writ fails to disclose adequate reasons for allowance of the writ. There is no conflict among the various Circuit Courts of Appeals covering the construction of General Order XXXII as amended April 17, 1933, and the other reasons relied on by the petitioner are unsubstantial and not within the terms of Rule 38 of the Revised Rules of the United States Supreme Court and applicable decisions.

The decree entered by the Circut Court of Appeals was clearly correct. On the return day several objecting creditors appeared in the District Court in opposition to the discharge, and on that day the District Judge entered an order granting ten days time within which to file specifications and the specifications were filed within said time. The District Judge has jurisdiction to vary the time for filing specifications which are uniformly held to be pleadings. Petitioner does not claim that the District Judge abused his discretion, but relies wholly upon the proposition that the District Judge has no discretion.

ARGUMENT

Point I.

The United States Supreme Court will not grant certiorari to review an interlocutory decree denying a motion to strike specifications of objections to a bankrupt's discharge.

This petition for a writ of certiorari should be denied because the United States Supreme Court will decline to review an interlocutory decree except under extraordinary circumstances. The order of the District Judge denying bankrupt's motion to strike out specifications has no finality. It does not end litigation but merely

requires a hearing of the specifications and at the end of the hearing a final decree will be entered allowing or denying the bankrupt's discharge. The District Court and the Circuit Court of Appeals have concurred in requiring a hearing upon these specifications and there is no showing of extraordinary inconvenience or embarrassment which is a condition precedent to invoking the jurisdiction of the Supreme Court for review by certiorari. The Supreme Court has defined a review on certiorari in Rule 38 (5) of Revised Rules of the Supreme Court of the United States as follows:

> "A review on writ of certiorari is not a matter of right but of sound judicial discretion and will be granted only where there are special and important reasons therefor."

There are no special nor important reasons for granting certiorari in this case.

The Supreme Court has enunciated the following General Rule with respect to its jurisdiction under Sec. 240 of the Judicial Code:

> "As has been many times declared, this is a jurisdiction to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision. And, except in extraordinary cases, the writ is not issued until final decree."
>
> *Hamilton-Brown Shoe Co. vs. Wolf Bros. & Co.,* 240 U. S. 251, 258.

The present petition for certiorari should be denied and the District Court will proceed to hear the petition for a discharge. The objecting creditors will offer evidence in support of specifications based upon transfers of three pieces of property made with intent to

hinder, delay and defraud creditors. The District Court will enter a final decree granting or denying the bankrupt's discharge.

The Supreme Court of the United States has held that an appeal from an interlocutory decree must be dismissed for lack of jurisdiction. *Arnold v. United States,* 263 U. S. 427, where the court held at *page* 434:

> "It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete; that is, final not only as to all the parties, but as to the whole subject-matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction."

The rule is well established that this court will not review interlocutory decrees by appeal when appeal was the proper method for reviewing decrees of the Circuit Court of Appeals and was briefly enunciated in *American Construction Co. vs. Jacksonville, Tampa & Key West Railway Co.,* 148 U. S. 372, where the court held, at *page* 378:

> "Under the Judiciary Act of 1879 and other acts embodied in the Revised Statutes, the appellate jurisdiction of this court from the circuit court of the United States was limited to final judgments at law, and final decrees in equity or admiralty. Acts of September 24, 1789, chap. 20, Par. 13, 22 (1 Stat. at L. 81, 84); March 3, 1803, chap. 40 (2 Stat. at L. 244); Rev. Stat. Par. 691, 692. No appeal, therefore, lay to this court from an order of the circuit court, granting or refusing an injunction, or appointing or declining to appoint a receiver pendente lite, or other interlocutory order, until after final decree."

Subsequent to the Acts of Congress mentioned in that decision there have been several Acts passed for the purpose of relieving the overburden of controversies appealable as of right to the Supreme Court. One of the most recent of these is the Act of February 13, 1925, to amend the Judicial Code which provides in *Section* 240 (*c*); *Chapter* 229, 43 *Stat. at L.* 936:

> "No judgment or decree of a Circuit Court of Appeals or of the court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section."

The section provides for review by certiorari and the language of the Supreme Court of the United States in *American Construction Co. vs. Jacksonville, Tampa & Key West Ry. Co.*, 148 U. S. 372, is peculiarly applicable to this subsequent legislation where the court says at *page* 382:

> "The primary object of this Act, well known as a matter of public history, manifest on the face of the Act, and judicially declared in the leading cases under it, was to relieve this court of the overburden of cases and controversies, arising from the rapid growth of the country, and the steady increase of litigation; and, for the accomplishment of this object, to transfer a large part of its appellate jurisdiction to the circuit courts of appeals thereby established in each judicial circuit, and to distribute between this court and those, according to the scheme of the Act, the entire appellate jurisdiction from the circuit and district courts of the United States."

Furthermore, the interlocutory decree in this matter has been entered in a proceeding in bankruptcy as distinguished from a controversy arising in bankruptcy proceedings.

> "Questions arising as to the right of the bankrupt to his discharge are not 'controversies arising in bankruptcy proceedings' but are 'proceedings in bankruptcy' themselves." *Treatise on the Bankruptcy Law of U. S. by Harold Remington, Fourth Edition, Sec.* 3675.

A recent decision of what constitutes a controversy arising in bankruptcy proceedings appears in *Taylor vs. Voss,* 271 U. S. 176, 180, where this court defines such controversies in the following language:

> "It is now settled by the decisions of this court, that the 'controversies arising in bankruptcy proceedings' referred to in Sec. 24a, include those matters arising in the course of a bankruptcy proceeding, which are not mere steps in the ordinary administration of the bankrupt estate, but present, by intervention or otherwise distinct and separable issues between the trustee and adverse claimants concerning the right and title to the bankrupt's estate." (citing cases).

The order entered by the District Judge in this case was not appealable to the Circuit Court of Appeals under Sec. 24a Bankruptcy Act July 1, 1898, 30 Stat. L. 553; c. 541, s. 24 as amended May 27, 1926, because it is not a controversy arising in bankruptcy proceedings.

The order entered by the District Judge was not appealable to the Circuit Court of Appeals under Section 25a Bankruptcy Act July 1, 1898, 30 Stat. L. 553; c. 541, s. 25 as amended May 27, 1926, as it is not a judgment adjudging or refusing to adjudge the defendant a bankrupt; a judgment granting or denying a discharge; or a judgment allowing or rejecting a debt or claim of $500 or over.

The order entered by the District Judge was not appealable to the Circuit Court of Appeals except under

Sec. 24b of the Bankruptcy Act of 1898 as amended. Section 24b provides that the several Circuit Courts of Appeals shall have jurisdiction in equity either interlocutory or final to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Therefore, the character of the order entered by the Circuit Court of Appeals in this matter is merely an order entered pursuant to the jurisdiction of the Circuit Court of Appeals to superintend and revise in matter of law the proceedings of an inferior court of bankruptcy. It would seem that the Supreme Court of the United States should at this time definitely determine for the guidance of all the courts that decrees entered by any circuit court of appeals under the jurisdiction granted in Section 24b would never be reviewed by the Supreme Court of the United States on writ of certiorari.

Respondents moved in the Circuit Court of Appeals to dismiss the appeal upon the ground that the order appealed from was not final, was an order preceding a final decision, the appeal was premature and the District Court had properly exercised its dicretion.

The Circuit Court of Appeals held the order entered by the District Court to be appealable under Section 24b of the Bankruptcy Act of July 1, 1898, 30 Stat. L. 553, c. 541, s. 24, which as amended May 27, 1926, provides:

> "24(b) The several circuit courts of appeal and the Court of Appeals of the District of Columbia shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law (and in matter of law and fact the matters specified in Section 25) the proceedings of the several inferior

courts of bankruptcy within their jurisdiction. Such power shall be exercised by appeal and in the form and manner of an appeal, except in the cases mentioned in said Section 25 to be allowed in the discretion of the appellate court."

However, what was said in support of the motion to dismiss is even more pertinent with respect to this petition to the Supreme Court for the writ of certiorari. The order of the District Judge refusing to strike specifications of objecting creditors ended nothing. There was no finality about such an order. There was no finality about the decree of the Circuit Court of Appeals affirming the order which should invoke certiorari by the Supreme Court to review such a preliminary order. The Circuit Court of Appeals has frequently held that it is not required to consider an appeal under Section 24b unless the decree has a certain degree of definiteness and finality.

In a leading case the Circuit Court of Appeals for the 3rd Circuit provided the definition of the kind of orders and decrees which would be considered on appeal under Section 24(b). Such decrees must have a certain degree of definiteness and finality in order to be appealable under Section 24(b). In this case, In *re Chotiner,* 218 F. 813, the court said, at page 813:

"Section 24b does not require us to revise every interlocutory order that may affect the course of a bankruptcy proceeding, whatever the nature or scope of the order may be; and we need hardly add that it is not part of our duty to answer questions, unless they arise in a proper appellate proceeding. Under Section 24b we can only be asked to review such orders or decrees when they have a certain degree of definiteness and finality. Moreover, there must always be numerous minor matters of administration

in which the District Court should be allowed to exercise a sound discretion that will ordinarily not be disturbed."

"In the case before us, the court has taken no positive, affirmative step in the cause, and has done nothing to affect definitely the rights of the petitioner. The record discloses merely an order by the District Judge reversing an order of the referee that confirmed a sale of the bankrupt's property, thus leaving the property still in the hands of the trustee."

In *In re Margolies,* 266 F. 203 C.C.A. 2d Circuit, there was a petition to revise and review an order of the District Court for the Eastern District of New York. Bankrupts were adjudicated in January 1918 and Margolies was discharged in July 1919. Some months later, the estate being closed, the Trustee required Margolies to show cause why an order should not pass requiring him to turn over to said Trustee about $7000 alleged to represent the value of property concealed and withheld by him from his estate in bankruptcy. Margolies appeared and pleaded that the court was without jurisdiction to entertain the motion because he had been discharged. This was overruled and an order entered sending the matter to a Commissioner to ascertain the facts and report. This order the petitioner brings up for review. The court held, on page 203:

" . . . The order complained of is plainly interlocutory, for the petitioner has as yet been required neither to pay nor perform; the trustee is given leave to prove his case—nothing more. It is also in a sense discretionary, for the court might have considered . . . that the certain expense of the proposed investigation outweighed probable gain."

" . . . We have pointed out that under the statute discretionary orders can be revised only for abuse of discretion, which is error of law (In re Weiden-

> feld, 254 Fed. 680, 166 C.C.A. 175) and that while we can review interlocutory proceedings, it is not advisable so to do (In re Strauss, 211 Fed. 123, 127 C.C.A. 521; In re Horowitz, 250 Fed. 106, 162, C.C.A. 278)."

One of the cases relied upon in In re Margolies is In *re Horowitz,* et al, 250 F. 106, C.C.A. 2d Circuit. This was a petition to revise an order of the District Court in bankruptcy proceedings. Bankrupts petitioned to revise an order relieving the Trustee from a stipulation relating to objections to the bankrupt's discharge. The petition was dismissed. The court held as follows: the bankrupt was presenting his application for discharge before the Referee; there had been delay in the matter; and the court stated page 107:

> " . . . and finally a stipulation was entered on the record that the matter should proceed on a day named, and unless the trustee as objector was ready, and went forward on that day, the referee should report in favor of discharge. On the day appointed, the trustee's attorney was not present, and the referee gave report recommending discharge as on default."

On the matter coming before the District Court for confirmation he relieved against the stipulation and ordered a further opportunity for hearing. This order is the subject of this review. The Circuit Court of Appeals held, on page 107:

> "(1) Nothing but matters, both interlocutory and of discretion, are here exhibited. Doubtless for error of law there is power in this court to revise even interlocutory proceedings in bankruptcy; but such resort to us is not favored when the matter can be raised by appeal or petition from the order or decree finally disposing of the matter."

The Supreme Court of the United States has almost never granted a writ of certiorari to review a decree entered by a Circuit Court of Appeals wherein its jurisdiction arose under Section 24b. A leading text writer states:

> "It does not appear that the Supreme Court has ever laid down any rules as to what cases it will review on certiorari and what it will refuse to review. If there is any classification, the Supreme Court has not declared it." *Remington Treatise on Bankruptcy, Fourth Edition, Section* 3878.

The Supreme Court should now declare for the guidance of the courts and the legal profession that the class of cases wherein the Circuit Court of Appeals obtains jurisdiction to revise and review in matter of law and in a summary way, the administrative steps in a bankruptcy proceeding will not be reviewed by the Supreme Court of the United States. Such administrative features of the Bankruptcy Act should properly be determined by the courts of Bankruptcy with supervisory revision by the Circuit Court of Appeals, making a final disposition of such matters.

Point II.

The petition for writ of certiorari should be denied because the petition fails to disclose adequate reasons for allowance of the writ.

Section 240a of the Judicial Code provides that all review of decrees of the Circuit Court of Appeals shall be taken by writ of certiorari issued by the Supreme Court. The Supreme Court has provided in Rule 38-5 Revised Rules of the Supreme Court of the United States that "A review on writ of certiorari is not a matter of

right but of sound judicial discretion and will be granted only where there are special and important reasons therefor."

The rule further provides certain reasons which, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered by the Supreme Court, as follows:

> "Rule 38-5. Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."
>
> Revised Rules of the Supreme Court of the United States, p. 32.

In addition to the reasons included in Rule 38, Revised Rules of the United States Supreme Court, the court has also laid down the general rule that certiorari is an extraordinary writ and the jurisdiction is to be used sparingly in cases of peculiar gravity and special importance. *Hamilton-Brown Shoe Co. vs. Wolf Bros. & Co.*, 240 U. S. 251 at 258. The avowed purpose of the Act of February 13, 1925 and of many prior Acts was to reduce the burdens of the Supreme Court and to transfer a large part of its appellate jurisdiction to the Circuit Courts of

Appeals. *American Construction Co. vs. Jacksonville, Tampa & Key West Ry. Co.,* 148 U. S. 372.

The first reason relied on by petitioner for allowance of a writ of certiorari is that the Circuit Court of Appeals has decided an important question of bankruptcy procedure which has not been but should be settled by the Supreme Court. Rule 38 of the Revised Rules of the U. S. Supreme Court does not include questions of bankruptcy procedure as reason for invoking the jurisdiction of the court. There are innumerable "questions of bankruptcy procedure" which might be deemed important to the litigant but none of which should be an adequate reason for granting certiorari by the Supreme Court. Any and all review as a matter of right was cut off by the Act of Febrary 13, 1925. Chapter 229, 43 Stats. L. 936.

This is a question of bankruptcy procedure reviewable by the Circuit Court of Appeals under Section 24b of the Bankruptcy Act July 1, 1898, 30 Stat. L. 553, c. 541, s. 24 as amended May 27, 1926 and should be finally decided by the Circuit Court of Appeals.

The second reason for allowance of the writ relied on by petitioner is based upon the claim that considerable uncertainty exists as to the construction to be placed upon the Amended Order 32. The decision of the Circuit Court of Appeals in the present case affirms the decision of the District Court holding that the District Judge has discretion to enter an order on the return day of a petition for discharge granting creditors who have appeared in opposition to the discharge ten days time to file specifications of their objections. In *re Lerner vs. First Wisconsin National Bank,* et al, 70 Fed. (2d) 938.

The only decision by a Circuit Court of Appeals claimed to be in conflict with the Lerner Case is *United Wall Paper Factories, Inc. vs. Hodges,* 70 Fed. (2d) 243. In that case notice was given to creditors that on May 22, 1933, the creditors must show cause why the bankrupt should not be discharged. On that day several objecting creditors appeared in opposition but did not file their specifications until May 31, 1933. No order was entered by the District Court granting additional time within which to file specifications. The bankrupt moved to strike out the specifications upon the ground that they were not filed in time and the District Judge decided that good cause had not been shown for failure to file the specifications on or before May 22, 1933. The Circuit Court of Appeals held with respect to amended General Order 32:

> "P. 244. The order, as amended, may have left power in the District Court to excuse a default; we do not find it necessary to decide, and arguendo we shall assume that it did."

Obviously the Circuit Court of Appeals in the Hodges case has merely decided that the District Judge did not abuse his discretion in declining to permit the specifications to be filed nine days after the return day. In the Lerner case the Circuit Court of Appeals has decided that the District Judge did not abuse his discretion in entering an order on the return day granting ten days time within which to file specifications and did not abuse his discretion in refusing to srike out the specifications which were filed within ten days. The cases are in harmony and not in conflict and are in harmony with a leading text writer on the subject, who states:

> "Sec. 3201. Although the express permission of former General Order 32 that the time for filing

> specifications in opposition to the discharge might be shortened or enlarged by special order of the judge was eliminated when the Supreme Court amended the General Order in 1933, yet it cannot rightly be inferred from such change that the general power of courts to grant extension of time in remedial matters is in this particular abrogated; indeed, the retention of the requirement that appearance in opposition must be entered in writing on the return day, while, at the same time, it is prescribed that specifications in writing are to be filed also on the return day, would carry the necessary implication that, on occasion, an extension of time to file the specifications might be granted; otherwise there would not be the double requirement of the entry of appearance on the return day and of the filing of the specifications on the same day, since the specifications themselves would constitute the most positive form of entry of appearance in opposition. Perhaps the expressing of the power to grant such extension was eliminated precisely because unnecessary." *Treatise on the Bankruptcy Law of the United States by Harold Remington, Fourth Edition.*

The third reason relied on by petitioner for allowance of the writ is equally insufficient. Bankrupt did not appear on the return day of the order to show cause either in person or by counsel. The application of the bankrupt for a discharge was set for hearing on November 18, 1933. The record shows without dispute that on November 17, 1933, counsel for the First Wisconsin National Bank filed written opposition to the bankrupt's discharge coupled with a motion for ten days time to file specifications (R. 3). On November 18, 1933, counsel for Jake Rakita, et al, appeared in open court and entered their appearance in opposition to the discharge of the bankrupt and requested ten days time within which to file written objections (R. 4). The

court thereupon entered an order granting objecting creditors ten days time to file specifications of objections to the discharge of said bankrupt (R. 32).

The duty of the bankrupt to be present at the hearing on November 18, 1933, appears from Section 7 of the Bankruptcy Act of July 1, 1898, 30 Stat. L. 548, c. 541, s. 7; 2 Supp. 848, which provides:

> "The bankrupt shall (1) attend the first meeting of his creditors if directed by the court or a judge thereof to do so *and the hearing upon his application for a discharge* if filed." (Italics ours)

This provision of the Bankruptcy Act is well recognized and is interpreted by one of the leading text writers as follows:

> "The bankrupt *must* present himself at the hearing upon his application for discharge, and is not permitted by absence to defeat the creditors from proving their grounds of opposition. He *must attend* without being ordered to do so; and he is not entitled to reimbursement of expenses in so doing." (Italics ours) Treatise on the Bankruptcy Law of the U. S. by Harold Remington, Fourth Edition, Sec. 3202.

This duty of bankrupt to appear at the hearing on his discharge is considered in the case of In *re Brown,* 42 F. (2d) 276, where the court quoted from various leading text writers on the subject. The District Court for the Eastern District of New York had under consideration the right of a bankrupt to be discharged from his debts if he failed to appear at the hearing on his discharge. The court came to the following conclusion at *page* 277:

> "Application for discharge denied unless the bankrupt submits to an examination within the time to be stated in the order to be entered herein."

The court also considered with approval the case of In *re Shanker,* 138 F. 862, which holds that the bankrupt has the absolute duty to attend the hearing on his application for a discharge even though not ordered to do so. The court held at *page* 864:

> "Such a hearing is not a meeting of creditors; nor is it essentially an examination of the bankrupt, although it may result in that. It is simply the occasion assigned for the trial of the issues raised by the exceptions to his discharge, in which, unlike the other proceeding subsequent to an adjudication, the bankrupt is an immediate and interested party. As such it is no hardship upon him to require that he shall be on hand to meet any demand in the way of evidence that may be made upon him . . . It follows that the bankrupt must attend before the referee at the further hearing upon his application for a discharge, on being given opportunity therefor, and that upon his failure to do so, the application must be dismissed. And it is so ordered."

In some jurisdictions this requirement that the bankrupt shall be present at the hearing on his application for a discharge is recognized by a specific rule of court on the subject which demonstrates the propriety of the requirement.

> "The propriety of this construction cannot be questioned when read in connection with Rule 14 of the Bankruptcy Rules of this court, which provides:
>
> > 'On the return day of the application for discharge or confirmation of a composition, the default of all creditors not appearing in opposition thereto shall be noted. If any appearance in opposition is filed, the bankrupt, *who must be personally present,* may be examined instanter, if desired, by the parties appearing.' (Italics ours.)

> "It is manifest, therefore, that the text authorities and the court in the case of In re Shanker, supra, have suggested the salutary and logical interpretation of the clause in question." In *re Brown,* 42 F. (2d) 276 at p. 277.

If the bankrupt had been present and had opposed the order of the District Judge extending the time to file specifications, the order granting or refusing an extension would have been binding upon the bankrupt and the objecting creditors. By not opposing said order the bankrupt has apparently acquiesced and the Circuit Court of Appeals correctly held:

> "To permit bankrupt to take advantage of an order entered upon her apparent acquiescence would be unfair." *Lerner vs. First Wisconsin National Bank,* 79 F. (2d) 938 at 939.

Point III.

The petition for certiorari should be denied because the decree entered by the Circuit Court of Appeals was clearly right.

The decree entered by the Circuit Court of Appeals was clearly right and requires no review. The District Court has jurisdiction to hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustees or other parties in interest at such time as will give the parties a reasonable opportunity to be fully heard. The applicable provision of the Bankruptcy Act of July 1, 1898, 30 Stat. L., 550, c. 541, s. 14; as amended May 27, 1926, reads as follows:

> "Section 14b. The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee

> or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard; and investigate the merits of the application and discharge the applicant, unless . . . "

Specifications of objections to the banrkupt's discharge are uniformly held to be pleadings, and are so defined in the Fourth Edition of Treatise on Bankruptcy Law of the United States by Harold Remington,

> "Sec. 3354. Specifications of objections to discharge are pleadings." Citing the following cases:
>
> In *re Abramovitz,* 253 Fed. 299.
>
> *Koch vs. Sidney Blumenthal & Co., Inc.,* 3 Fed. (2d) 395 and other cases.

The District Judge has general authority to vary the time allowed for return of process, of appearance and pleading, as specifically provided in General Order XXXVII, adopted by the Supreme Court of the United States, November 28, 1898 as amended, which reads in part as follows:

> "The judge may, by special order *in any case,* vary the time allowed for return of process, for appearance and pleading, . . . and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing." (Italics ours).

Accordingly, the District Judge merely exercised his general jurisdiction and authority as recognized by General Order XXXVII when he varied the time for filing these pleadings and granted a ten days extension. Furthermore, the time for filing pleadings is always in the control of the District Court analogous to the well-established rule that courts may enlarge the time to plead in other law suits when the time to plead is fixed by statute.

Prior to April 17, 1933, General Order XXXII provided as follows:

> "A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be shortened or enlarged by special order of the judge." (As amended June 4, 1917.)

Under General Order XXXII as it existed prior to April 17, 1933, the Circuit Court of Appeals for the 8th Circuit had occasion to consider the construction of the General Order and determined that the District Court had power to permit the entry of appearances of creditors even after the day fixed to show cause. This case was originally reported as In *re Rerat,* 14 F. (2d) 607, where the District Court held at page 608:

> "The power of the court to extend the time for the objecting creditor to appear and plead in opposition to the discharge of the bankrupt is analogous to the well-established rule that courts may enlarge and extend the time to plead in ordinary lawsuits, when the time to plead is fixed by statute. If the court has discretionary power to extend the time to plead, when the time is fixed by statute, it seems it would also have the same power when the time is limited by a rule of court.
>
> The authorities seem unanimous to the effect that it is within the discretion of the court, for good cause shown, to extend the time within which a creditor may enter his appearance in opposition to a bankrupt's discharge, even after the expiration of the limit as provided in General Order No. 32."

And the Circuit Court of Appeals, on petition to review the order, stated that the District Court was justified in exercising its discretion, and held:

> "While the power to extend the time should be cautiously exercised, we think there was no abuse of that power here."
>
> *Rerat vs. Fisk Tire, Inc.,* 28 F. (2d) 607.

And this discretion of the District Court in the administration of General Order XXXII is upheld in In *re D. H. Stiebel & Sons,* 40 F. (2d) 637, where the Circuit Court of Appeals for the 6th Circuit held, at page 637:

> " . . . When it became apparent that his (the trustee's) authority to so act was technically defective, we think the District Court had power to entertain and allow a motion to be substituted on the part of other creditors, who had refrained from entering an appearance and filing specifications only because such act seemed vain in view of their apparent representation by the trustee. The decisions upon the point all hold the right to enlarge the time for entering appearance and filing exceptions rests in the sound discretion of the District Judge."
>
> "Nor do we think that the court below abused his discretion."

And this discretionary power in the District Court is expressly recognized in In *re Brecher,* 4 F. (2d) 1001, C.C.A. 2nd Circuit, and In *re Levin,* 176 F. 177, 99 C.C.A. 531, 1st Circuit.

On April 17, 1933, General Order XXXII was amended, effective April 24, 1933, to read as follows:

> "A creditor opposing an application for discharge, or for the confirmation of a composition or extension proposal, shall enter his appearance in opposition thereto on the day when the creditors are required

to show cause, and shall at the same time file a specification in writing of the grounds of his opposition."

In this bankruptcy proceeding the objecting creditors appeared on or before the time when they were required to show cause why the discharge should not be granted and applied to the court for ten days time within which to file detailed specifications of their objections. These specifications enumerated in detail the transfer of certain pieces of real estate made by the bankrupt with intent to hinder, delay and defraud the objecting creditors. If the District Court had required the specifications to be filed on November 18, 1933, the creditors could have dictated into the record general specifications which undoubtedly would have met all the criticism raised by the attorney for the bankrupt. Neither the bankrupt nor the bankrupt's counsel appeared at the hearing on November 18, 1933, to insist that specifications must be filed at that time. The court deeming that it had full jurisdiction to modify the time for filing a pleading of this sort and full authority to permit objecting creditors a short reasonable time for filing detailed specifications in proper form, entered an order in open court granting the objecting creditors ten days time within which to file specifications.

The bankrupt does not suggest that the District Court has been guilty of an abuse of discretion but claims that the District Judge had no discretion to enter the order. The order entered by the District Judge was entered within the time that creditors were required to show cause under General Order XXXII as amended. Specifications of objections are a pleading and the court extended the time for filing the pleading in accordance

with the well-known provisions of General Order XXXVII.

Suppose that a bill of complaint had been served in a plenary suit pending in the District Court, requiring defendant to file an answer within twenty days. If the defendant had appeared before the District Judge on the 19th or 20th day and obtained an ex parte order extending the time within which to serve and file an answer, it would indeed be a hardy plaintiff's counsel who would move to strike the answer upon the ground that the court did not have power nor authority nor discretion to extend the time for serving and filing a pleading.

Only two other cases have considered the effect of General Order XXXII since its amendment. The case of In *re Hodges,* 70 F. (2d) 893, and *United Wall Paper Factories vs. Hodges,* 70 F. (2d) 243, have been discussed and the ruling shown to be in conformity with the ruling in the Lerner case. The other case is In *re Corcoran,* 4 Fed. Supp. 988, decided October 16, 1933. This was a decision by the District Judge holding that where creditors did not appear prior to the return day but came in several days after the return day, the Judge did not have discretion to extend the time for opposing a discharge and filing specifications. The case is clearly distinguishable from the Lerner case.

The full beneficial effect of General Order XXXII as amended will be accomplished by the construction adopted by the District Judge and the Circuit Court of Appeals in this case. Specifications will be filed on or before the return day except when an application is made to the court on or before the return day for a short rea-

sonable extension of time within which to file the specifications. This construction of the amended general order is entirely reasonable and fair and recognizes the jurisdiction of the District Court to modify the rules of pleadings so as to facilitate the disposition of the bankrupt's petition for discharge and objections thereto if any are filed.

On December 16, 1933, the motion of the bankrupt to strike the specifications came on to be heard and was argued and submitted by counsel. The District Judge considered and reviewed his authority to make the order of November 18, 1933, and came to the conclusion that he had authority and jurisdiction to make such order. Counsel for the bankrupt did not contend that the District Judge had abused his discretion. The creditors relied upon the order of the District Judge granting a ten-day extension and prepared careful and complete specifications which were duly filed within such ten-day period.

For the foregoing reasons the respondent First Wisconsin National Bank of Milwaukee respectfully submits that the petition for writ of certiorari should be denied.

Respectfully submitted,

EDGAR L. WOOD,
213 West Wisconsin Avenue,
Milwaukee, Wisconsin,
Counsel for Respondent.
FIRST WISCONSIN NATIONAL BANK
OF MILWAUKEE.

JOHN C. WARNER,
Of Counsel.

APPENDIX

Act of February 13, 1925, Chapter 229, 43 Stat. L. 936:

> Sec. 240(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.
>
> Sec. 240(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise than as provided in this section.

Bankruptcy Act of July 1, 1898, 30 Stat. L. 553, c. 541, s. 24a, 24b, and 25a as amended May 27, 1926:

> Sec. 24a. The Supreme Court of the United States, the circuit courts of appeal of the United States, the Court of Appeals of the District of Columbia, and the supreme courts of the Territories, in vacation, in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases.
>
> Sec. 24b. The several circuit courts of appeal and the Court of Appeals of the District of Columbia shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law (and in matter of law and fact the matters specified in Section 25) the proceedings of the several in-

ferior courts of bankruptcy within their jurisdiction. Such power shall be exercised by appeal and in the form and manner of an appeal, except in the cases mentioned in said Section 25 to be allowed in the discretion of the appellate court.

Sec. 25a. That appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit courts of appeal of the United States and the Court of Appeals of the District of Columbia and to the Supreme Courts of the Territories in the following cases, to-wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt; (2) from a judgment granting or denying a discharge; and (3) from a judgment allowing or rejecting a debt or claim of $500 or over. Such appeal shall be taken within thirty days after the judgment appealed from has been rendered, and may be heard and determined by the appellate court in term or vacation, as the case may be.

Revised Rules of the Supreme Court of the United States:

Rule 38-5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in

conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

General Orders in Bankruptcy, adopted by the Supreme Court of the United States, November 28, 1898:

General Order XXXII. A creditor opposing the application of a bankrupt for his discharge, or for the confirmation of a composition, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall file a specification in writing of the grounds of his opposition within ten days thereafter, unless the time shall be shortened or enlarged by special order of the judge. (As amended June 4, 1917.)

General Order XXXII. A creditor opposing an application for discharge, or for the confirmation of a composition or extension proposal, shall enter his appearance in opposition thereto on the day when the creditors are required to show cause, and shall at the same time file a specification in writing of the grounds of his opposition. (As amended April 17, 1933.)

General Order XXXVII. In proceedings in equity, instituted for the purpose of carrying into effect the provisions of the act, or for enforcing the rights and remedies given by it, the rules of equity practice established by the Supreme Court of the United States shall be followed as nearly as may be. In proceedings at law, instituted for the same purpose, the practice and procedure in cases at law shall be followed as nearly as may be. But the judge may, by special order in any case, vary the time allowed for return of process, for appearance and pleading, and for taking testimony and publication, and may otherwise modify the rules for the preparation of any particular case so as to facilitate a speedy hearing.